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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CHEESE & BLACKWELL COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 35–40) has not yet been reported. The opinion of the United States District Court for the District of Maryland is reported at 145 F. Supp. 164.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1957. The petition for a writ of certiorari was filed on March 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Trade Commission has subpoena power in proceedings under the Clayton Act.

STATUTES INVOLVED

Pertinent provisions of the Clayton Act (15 U. S. C. 12, *et seq.*) and the Federal Trade Commission Act (15 U. S. C. 41, *et seq.*) are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

In November 1955, the Federal Trade Commission issued complaints against three corporations, charging each with discriminatory practices in violation of Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13 (d) (J. A. 5–8).[1] In January 1956, the hearing examiner issued subpoenas *duces tecum* directing petitioners, who are the presidents of the corporations, to produce certain corporate records (J. A. 8–10, 12). Petitioners moved to quash the subpoenas on the ground, *inter alia*, that since the Clayton Act does not in terms grant the Commission subpoena power, and since Section 9 of the Federal Trade Commission Act authorizes the Commission to issue subpoenas only "for the purposes of this Act," the Commission has no subpoena power in proceedings under the Clayton Act (J. A. 12). The hearing examiner denied the motions (J. A. 11), and the Commission affirmed (J. A. 12–13). The subpoenas were not complied with, and the Commission then filed applications for their enforcement in the United

[1] "J. A." refers to appellants' Joint Appendix in the Court of Appeals.

States District Court for the District of Maryland (J. A. 28). The District Court, in a careful opinion (J. A. 27–38), granted the applications and directed enforcement (J. A. 38–39), and the Court of Appeals unanimously affirmed.

In holding that the Commission's subpoena power extends to proceedings under the Clayton Act, the Court of Appeals pointed out (Pet. 36–37) that the Clayton and Federal Trade Commission Acts were "before Congress at the same time and were in pari materia dealing with the same general subject matter, restraints of trade and unfair competition"; that the Clayton Act "laid down substantive rules of law and provided for their enforcement by courts and administrative agencies"; that the Federal Trade Commission Act created the Commission and conferred various powers upon it, including the power to investigate corporate business practices; and that the Commission's authority, under Section 11 of the Clayton Act, to enforce compliance with that Act (except as to banks and common carriers) "could mean nothing else than that, in carrying out this provision, the Commission should exercise the powers with respect to investigations and hearing vested in it by the act of its creation," including the "power to examine documents and witnesses and issue subpoenas" provided in Section 9 of the Federal Trade Commission Act.

The court rejected, as an "unreasonable and forced construction," petitioners' contention that the introductory phrase in Section 9, "for the purposes of this Act," limits the Commission's subpoena power to proceedings under the Federal Trade Commission Act, since

one of the "purposes of the act" was to give the Commission "adequate powers to conduct investigations and proceedings with respect to restraints of trade and unfair competition" (Pet. 38). The "manifest purpose" of Section 9, the court stated (*ibid.*), was "to give the Commission the power of subpoena and examination in connection with any investigation or proceeding which it was authorized by law to conduct." The court further stated (Pet. 36) that, in determining whether the Commission has subpoena power in Clayton Act proceedings, it was "not without significance" that for more than 40 years the Commission had exercised such power and had issued "many thousands of such subpoenas," and that it is "not reasonable to suppose" that such power would have "gone unchallenged" for so long a period "if there were any real doubts as to its existence."[2]

ARGUMENT

Petitioners, on the basis of a highly technical and artificial reading of Section 9 of the Federal Trade Commission Act, seek to overturn the settled administrative interpretation, of 40 years standing, that the Federal Trade Commission has subpoena power in proceedings under the Clayton Act. The court below, construing the Federal Trade Commission and the Clayton Acts *in pari materia*, concluded that neither the language nor the legislative history of either statute justifies such a crippling construction of Section 9—a

[2] The Court of Appeals also rejected, as had the Commission (J. A. 13) and the District Court (J. A. 35–38), petitioners' contention that the subpoenas were invalid for other reasons (Pet. 39–40). Petitioners do not make that contention here.

construction which, as the court pointed out (Pet. 39), "would in large measure defeat the purpose which Congress manifestly had in mind in the enactment of these statutes." The decision below is in accord with subsequent unanimous decisions by courts of appeals in two other circuits;[3] it is clearly correct; and there is no occasion for further review by this Court.

1. Section 11 of the Clayton Act authorizes the Federal Trade Commission (except in case of companies subject to the jurisdiction of certain other regulatory agencies) "to enforce compliance with" Sections 2, 3, 7, and 8 of the Act, and specifies the administrative and judicial procedures which the Commission is to follow in so doing. Section 9 of the Federal Trade Commission Act gives the Commission the power by subpoena to compel testimony and production of documentary evidence. The Court of Appeals ruled (Pet. 36) that the two statutes "were in pari materia dealing with the same general subject matter, restraints of trade and unfair competition" and, therefore, were to be construed together, and, so construing the acts, held

[3] In *Federal Trade Commission* v. *Tuttle* (C. A. 2, No. 232, April 2, 1957), and *Federal Trade Commission* v. *Reed* (C. A. 7, No. 11839, April 11, 1957), the courts upheld the Commission's subpoena power in Clayton Act proceedings. Pertinent portions of the opinion in the *Tuttle* case, and the opinion in the *Reed* case, are set forth in the Appendix, *infra*, pp. 18–23. Although Judge Medina dissented in the *Tuttle* case, it was on another issue.

Petitioners rely (Pet. 7, 25, 32) on *Federal Trade Commission* v. *Rubin*, 145 F. Supp. 171 (S. D. N. Y.), in which the District Court held that the Commission has no subpoena power in Clayton Act proceedings. That case is pending on appeal to the Court of Appeals for the Second Circuit. In view of the *Tuttle* case, however, the *Rubin* case is not the law in the Second Circuit.

that the Commission's subpoena power under Section 9 of the Trade Commission Act extends to proceedings to enforce the Clayton Act.

Statutes are *in pari materia* when they "relate to the same person or thing, or to the same class of persons or things, or have the same purposes or object." 2 Sutherland on *Statutory Construction* (3rd ed.), Section 5202 at pp. 535–536. The Federal Trade Commission Act and the Clayton Act were both intended by Congress to deal with anticompetitive practices "in their incipiency," and their "great purpose" was to secure "fair opportunity for the play" of economic forces and to protect the public from "abuses arising in the course of" competition. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647; cf. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 476. "It is obvious, therefore, that in order to carry into execution the intention of" Congress, these two statutes, which deal with "the same subject-matter must be taken together and construed in connection with each other." *Converse* v. *United States*, 21 How. 463, 467; *United States* v. *Freeman*, 3 How. 556, 564; cf. *United States* v. *Stewart*, 311 U. S. 60, 64–65; *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159, 166. This rule is particularly applicable where, as here, the statutes not only relate to the same subject matter but were considered at the same session of Congress, debated together, and enacted within a short time of each other.[4]

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[4] The Federal Trade Commission Act was enacted on September 26, 1914, and the Clayton Act on October 15, 1914.

When the statutes are construed together, we think it clear that the Commission's subpoena power extends to proceedings under the Clayton Act. As the Court of Appeals noted, the Clayton Act "laid down substantive rules of law and provided for their enforcement by courts and administrative agencies." Section 11 of that Act vested enforcement thereof (except as to certain companies) in the Federal Trade Commission, and set forth the procedures which the Commission is to follow. But such specification of procedures does not preclude the Commission from using its general investigatory and subpoena powers in carrying out its Clayton Act enforcement functions. Those powers are provided in the statute which created the Federal Trade Commission, and we submit that they may be utilized in the performance of all duties with which the Commission is charged—including that of enforcing the Clayton Act.

Petitioners argue (Pet. 12–14) that since Section 9 of the Trade Commission Act contains the introductory phrase "for the purposes of this Act," the subpoena power which that Section grants is limited to proceedings to enforce that Act.[6] But "the purposes" of the Act are broader than the mere conduct of such proceedings. The heading of the Trade Commission Act states that it is an Act "[to] create a

[6] As petitioners note (Pet. 13), the United States Code, 15 U. S. C. 49, substitutes for the phrase "for the purposes of this Act" the phrase "for the purposes of section 41–46 and 47–58 of this title." However, the language of the Statutes at Large prevails over the wording of a Code title which, as here, has not been enacted into positive law.

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Federal Trade Commission, to define its powers and duties, and for other purposes." The Commission is not only charged with preventing unfair methods of competition and with conducting general investigations of anticompetitive practices (Sections 5 and 6 of the Trade Commission Act, respectively), but also with enforcing the Clayton Act. The fact that the latter duty is given to the Commission by the Clayton Act rather than by the Trade Commission Act does not make its performance any the less one of the functions for which the Commission was created. Thus, assuming that the phrase "for the purposes of this Act" qualifies the Commission's subpoena power,* we submit that a subpoena issued in proceedings under the Clayton Act is for such purpose.

The fact that Section 11 of the Clayton Act does not expressly grant the Commission subpoena power does not show, as petitioners contend (Pet. 20–27), that Congress intended to deny the Commission such power. On the contrary, a more reasonable explanation of the absence of specific subpoena power in Section 11 is that "Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act." *Federal Trade Commission* v. *Tuttle*, C. A. 2,

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* The phrase "for the purposes of this Act" precedes the clause in Section 11 authorizing the Commission to inspect and copy documentary evidence, and this clause is separated by a semicolon from the succeeding clause granting the subpoena power. Thus, it is arguable that the "purposes" limitation does not appy to the subpoena power but only to the power to inspect and copy.

Appendix, *infra*, p. 20. The language of Section 11 supports this view. The last paragraph of that Section prescribes the procedure for serving "[c]omplaints, orders, and *other processes* of the Commission" (emphasis added). The words "*other* processes" plainly cover subpoenas.[7]

Nor does the fact that Congress, in later statutes giving the Commission additional duties, explicitly authorized the Commission to exercise all of its powers under the Federal Trade Commission Act establish (as petitioners contend, Pet. 14–19) that the Commission was not intended to exercise such powers under the Clayton Act. Since the later statutes were passed many years after the Federal Trade Commission Act and deal with a much narrower area of unfair trade practices, they may not be *in pari materia* with the Federal Trade Commission Act. Congress, therefore, apparently deemed it desirable to state that, in enforcing those statutes, the Commission was to exercise all its powers under the Federal Trade Commission Act.

During the forty years that it has enforced the Clayton Act, the Commission consistently has con-

[7] Petitioner contends (Pet. 9) that a bill recently introduced in Congress (Pet. 41) to amend Section 9 of the Trade Commission Act to make the Commission's subpoena power expressly applicable to Clayton Act proceedings "specifically recognizes that the Clayton Act does not contain subpoena powers." But the bill, as its title states, is merely intended to "clarify" the Commission's subpoena powers under Section 9, and such a bill does not necessarily imply a present lack of power. In any event, the mere introduction of a bill to amend a statute "is without meaning for purposes of statutory interpretation." *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 529.

strued its subpoena power as extending to proceedings under that Act. As the Court of Appeals pointed out (Pet. 36), it is "not reasonable to suppose" that the use of such power would have "gone unchallenged" for so long a period if there "were any real doubts as to its existence." An "administrative practice, consistent and generally unchallenged," will not be disturbed if the statutory command is "indefinite and doubtful" (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315), particularly where, as here, the practice is necessary to carry out "the declared will of the legislative body" (*Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 262).

2. Petitioners' construction of the Acts would produce an "unreasonable" result which is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Associations*, 310 U. S. 534, 543. As the Court of Appeals pointed out in the *Tuttle* case (Appendix, *infra*, pp. 19–20), "[a]n adequate subpoena power is essential to any investigation of offenses under the Clayton Act and to the enforcement" of its provisions. Clayton Act proceedings generally involve broad and complex issues, and their resolution usually requires a detailed study of pricing, distribution, and competitive practices in the industry concerned. Without subpoena power to obtain the necessary information relating to such practices, the Commission would be unable effectively to carry out its statutory duty to "enforce compliance" with the Clayton Act.

Moreover, since the issues in Clayton Act and in Federal Trade Commission Act proceedings frequently are

similar, and sometimes overlap, it would be anomalous if Congress had granted the Commission subpoena power under the latter Act but denied it such power under the former. Indeed, the Commission may charge violation of both Acts in the same proceeding based on the same or similar practices (cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (C. A. 6)), and it would make little sense in such cases to permit the Commission to subpoena only such material as is pertinent to the charge under the Federal Trade Commission Act. Finally, as the Court of Appeals pointed out (Pet. 39), the Commission could have issued subpoenas under Section 9 of the Federal Trade Commission Act if, prior to issuing a formal complaint under the Clayton Act, it had conducted an investigation (under Sections 5 or 6 of the Federal Trade Commission Act) into these same discriminatory practices; and it could have used "the information thus obtained in a subsequent proceeding to enforce the provisions of the Clayton Act." As the court correctly concluded (*ibid.*), the Commission's power to issue subpoenas and conduct the investigation "is not less" because, by issuing a complaint under the Clayton Act, it gives notice that such information is to be used to enforce that Act.

CONCLUSION

The decision of the Court of Appeals is correct, and there is no conflict of decisions. Accordingly, it is

respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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Federal Trade Commission.

APRIL 1957.

APPENDIX

Section 2 (d) of the Clayton Act, 15 U. S. C. 13, provides as follows:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 11 of the Clayton Act, 15 U. S. C. 21, provides as follows:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade

Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Com-

mission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evi-

dence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, provides in pertinent part as follows:

That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

* * * * *

United States Court of Appeals For the Second Circuit

No. 232—October Term, 1956

(Argued January 16, 1957. Decided April 2, 1957.)

Docket No. 24325

FEDERAL TRADE COMMISSION, PETITIONER-APPELLANT

v.

W. W. TUTTLE, RESIDENT MANAGER, ERNST & ERNST, RESPONDENT-APPELLEE

Before: Medina and Hincks, Circuit Judges, and Leibell, District Judge.

* * * * *

LEIBELL, *District Judge*

The question to be decided on this appeal concerns the power of the Federal Trade Commission under Section 9 of the Federal Trade Commission Act, to subpoena documents and records of third parties "In the Matter of A. G. Spalding & Bros. Inc," a corporation against which the Commission had filed a complaint, charging it with a violation of Section 7 of the Clayton Act (T. 15 U. S. C. § 18). The District Court denied an application by the Commission for an order enforcing a subpoena *duces tecum* to compel Ernst & Ernst, the accountants for the Athletic Goods Manufacturers Association, to produce records of members of the Association in the possession of the accountants, and their own records relating thereto.

* * * * *

Defendant's contention that the Federal Trade Commission does not have the power to issue subpoenas in a proceeding under the Clayton Act, overlooks the fact that both the Clayton Act and Federal Trade Commission Act were under consideration by

the Congress at the same time;[4] that the Congressional debates show that investigations under the Clayton Act were to be conducted by the Commission;[5] that the Commission is mentioned in Sections 2, 7 and 11 of the Clayton Act; and that under Section 11 of the Clayton Act (§ 21 of T. 15 U. S. C.) the Federal Trade Commission is authorized to enforce compliance with Section 7 of the Clayton Act (§ 18 of T. 15 U. S. C.). Likewise the Commission was granted the power under Section 1 of the Robinson-Patman Act (§ 13 of T. 15 U. S. C.) to investigate and institute proceedings to enforce the provisions of the Robinson-Patman Act. The Supreme Court has held that the Commission possesses "broad power of investigation and subpoena" which it may use prior to the filing of a complaint for price discrimination, a violation of the Robinson-Patman Act. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 79. The subpoena power necessary for that purpose is found in Section 9 of the Federal Trade Commission Act. The Robinson-Patman Act contained no subpoena powers.

An adequate subpoena power is essential to any investigation of offenses under the Clayton Act[6] and

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[4] The Federal Trade Commission Act was enacted by the 63rd Congress (2nd Session) on September 26, 1914, and the Clayton Act was enacted October 15, 1914.

[5] 51Cong. Rec. 12918; 14475; 13214; 14090; 14222; 16162; 16319; 16332.

[6] Chap. 323, 38 Stat. 730 (Oct. 15, 1914).

The Federal Trade Commission Act supplements the Clayton and Sherman Acts; and Section 5 of the Federal Trade Commission Act "minimally registers violations of the Clayton and Sherman Acts." *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 609. The Federal Trade Commission has the power to suppress as unfair competition, practices of a combination that run counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 463 (footnote 1).

to the enforcement of Section 7 of that Act. The Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act.[7] The Congress followed a similar course in later anti-monopoly and unfair trade-practices Acts,[8] relating to certain specific industries or markets, and it did not in those Acts set forth the subpoena powers required for the investigations to be conducted by the Commission.

* * * * *

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[7] See opinion of Thomsen, C. J. (Md.) in *Federal Trade Commission* v. *Menzies*, 145 F. Supp. 164, 168 in support of this power, and opinion of Judge Dimock (S. D. N. Y.) in *Federal Trade Commission* v. *Rubin*, 145 F. Supp. 171, *contra*, presently on appeal to this Court (Docket #24449).

On appeal to the Fourth Circuit Court of Appeals, that Court, in an opinion by Parker, C. J., affirmed on March 7th Judge Thomsen's decision in the *Menzies* case, and held that in a proceeding against three corporations, which were charged with the violation of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, the Federal Trade Commissior could exercise its right to subpoena records under Section 9 of the Federal Trade Commission Act.

A recent (Feb. 15, 1957) opinion of Judge Hoffman (No. Dist. of Ill.) holds that the "subpoena power conferred upon the Commission is available to it in the discharge of its duties under this Clayton Act," citing *F. T. C.* v. *Reed Candy Co.*, another Northern District Illinois case, decided June 12, 1956.

[8] The Acts under which the Federal Trade Commission exercises responsibilities are listed in Section 1.2 entitled "Laws Administered" under Subpart A of Part 1 (setting forth general procedures and rules of practice of the Federal Trade Commission) 15 U. S. C. A. § 1.2 of the 1956 Cumulative Annual Pocket Part for Title 15, §§ 41 to 80.

In the United States Court of Appeals
For the Seventh Circuit

No. 11839

September Term 1956—April Session 1957

FEDERAL TRADE COMMISSION, PETITIONER-APPELLEE

v.

WILLIAM T. REED, PRESIDENT, REED CANDY COMPANY, RESPONDENT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

April 11, 1957

Before Duffy, Chief Judge, Lindley and Swaim, Circuit Judges.

SWAIM, *Circuit Judge*

This appeal questions the power of the Federal Trade Commission to issue subpoenas duces tecum in proceedings before the Commission on a complaint charging violation of the Clayton Act, as amended.

On November 21, 1955, the Federal Trade Commission ("F. T. C.") issued a complaint charging the Reed Candy Company with violation of Section 2 (d) of the Clayton Act, as amended. 49 Stat. 1526, 15 U. S. C. A. § 13 (d). The proceeding was duly assigned to an examiner of the F. T. C. for hearing and initial decision. The examiner, on February 20, 1956, caused a subpoena duces tecum to be served on William T. Reed, as President of the Reed Candy Company, directing him to appear and testify before the F. T. C. and to produce certain documentary evidence described in the subpoena. Reed's motion to quash the subpoena was denied by the examiner and on appeal to the F. T. C. the examiner's ruling was af-

firmed. On April 4, 1956, another subpoena was issued which was identical in all respects with the first except that the date for the hearing was set for April 11, 1956. Reed did not appear at the April 11 hearing, but his counsel was present and he explained that Reed's refusal to obey the subpoena was upon the advice of counsel that the F. T. C. lacked subpoena power in proceedings under the Clayton Act.

On May 7, 1956, the F. T. C. filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, for an order requiring Reed to comply with the subpoena. The District Court ordered Reed to appear and show cause why the application should not be granted. After answer to the application of the F. T. C. and a hearing on the matter the District Court, on June 12, 1956, entered an order directing compliance by Reed with the subpoena. From that order Reed has taken this appeal.

The arguments of the parties may be briefly summarized as follows: Reed contends that the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. A. §§ 12–27, prescribes a self-contained procedure for the enforcement of its provisions and does not contain a substantive grant of subpoena power. The F. T. C. contends that the subpoena and investigational powers granted it by the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. A. §§ 41–46 and 47–58, may properly be used in the discharge of the F. T. C.'s duties under the Clayton Act, as amended. This question has recently been the subject of decision in the district courts. *Federal Trade Commission* v. *Menzies,* D. C. Md., 145 F. Supp. 164 (holding for the F. T. C.); and *Federal Trade Commission* v. *Rubin, S. D. N. Y.,* 145 F. Supp. 171 (holding against the F. T. C.).

During the pendency of this appeal the *Menzies* decision has been reviewed and affirmed by the Court of Appeals for the Fourth Circuit, per Judge John J. Parker, *Menzies* v. *Federal Trade Commission* (No. 7352, decided March 7, 1957), — F. 2d —. We agree with the Fourth Circuit that the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in pari materia—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. We hold that the F. T. C. may properly use the subpoena power granted it by Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. A. § 49, in proceedings before the F. T. C. on a complaint charging violation of the Clayton Act, as amended.[1] Even if the question were more doubtful than we think, we should be hesitant to reject the conclusion of the F. T. C. fortified as it is by years of administrative practice, consistent and generally unchallenged.

The order of the District Court is affirmed.

A true Copy:

Teste:

_____ _____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[1] On April 2, 1957, the Court of Appeals for the Second Circuit sustained the power of the F. T. C. to subpoena documents pursuant to Section 9 of the Federal Trade Commission Act in a proceeding before the F. T. C. on a complaint charging violation of Section 7 of the Clayton Act. *Federal Trade Commission* v. *W. W. Tuttle, Resident Manager, Ernst & Ernst* (No. 24325), —— F. 2d ——.

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